(10)

No. 91-1200

IN THE

Supreme Court of the United States

OCTOBER TERM 1991

CITY OF CINCINNATI,

Petitioner,

—v.—

DISCOVERY NETWORK, INC. *et al.*,

Respondents.

BRIEF *AMICI CURIAE* OF ASSOCIATION OF NATIONAL ADVERTISERS, INC.; AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; NATIONAL ASSOCIATION OF MANUFACTURERS; GROCERY MANUFACTURERS OF AMERICA, INC.; AND NATIONAL FOOD PROCESSORS ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE*

Interest of *Amici Curiae*

The Association of National Advertisers, Inc., ("A.N.A."), the American Association of Advertising Agencies ("A.A.A.A."), the National Association of Manufacturers ("NAM"), the Grocery Manufacturers of America ("GMA"), and the National Food Processors Association ("NFPA") respectfully submit this brief *amici curiae* in support of respondents in this case. Letters of consent to its filing have been lodged with the Clerk of the Court.

The Association of National Advertisers, Inc., the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a kaleidoscopic array of goods and services and account for almost 80% of the nation's annual national and regional advertising expenditures. As the nation's principal community of commercial speakers, A.N.A. has long been committed to the advancement of

commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

The American Association of Advertising Agencies is a national trade association organized under the laws of the State of New York. A.A.A.A.'s membership is comprised of over 730 advertising agencies doing business throughout the United States. A.A.A.A. members create and place some 80 percent of all national advertising and substantial amounts of local and regional advertising. In addition, A.A.A.A. members provide a full range of marketing services to their clients, including product promotion, public relations, direct marketing, merchandising, design and packaging services. A.A.A.A. is dedicated to advancing the interests of the advertising industry and has actively represented its members in connection with governmental efforts to restrict speech.

The National Association of Manufacturers of the United States of America is a voluntary business association of more than 12,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. The members of NAM and these councils are vitally interested in the extent to which governments may restrict their ability to publicize product and service information.

The Grocery Manufacturers of America, Inc. is a non-profit trade association organized under the laws of the State of Delaware. GMA's members include approximately 140 manufacturers of food and other consumer products sold in retail outlets throughout the United States. The members use virtually all forms of media to advertise and communicate with consumers about their products nationwide. A central purpose of GMA is to advance the common interests of its members before governmental bodies and regulatory authorities.

The National Food Processors Association, the principal scientific and technical trade association for the food indus-

try, serves its members and consumers by representing the industry on legislative, regulatory and consumer issues. NFPA is the scientific voice of the food industry. The association's three research laboratories serve NFPA's 500 members, manufacturers of the nation's processed-packaged fruits and vegetables, meat and poultry, seafood, juices and drinks, and specialty products.

Summary of Argument

Cincinnati seeks to draw a bright-line distinction between newspapers and commercial speech. Newspapers are permitted virtually unrestricted access to an important medium of communication—sidewalk newsracks—while speech labelled as "commercial" by Cincinnati officials is flatly banned. Cincinnati seeks to justify the discriminatory treatment by arguing that commercial speech is less important than newspapers. But Cincinnati's rationale for censorship breaks down on two levels. First, the speech at issue in this case, whatever its label, deserves plenary free speech protection. Speech informing individuals of educational and residential opportunities is entitled to full First Amendment protection. *Bigelow v. Virginia*, 421 U.S. 1 (1975); *Shelly v. Kraemer*, 334 U.S. 1 (1948). Second, permitting the censorship of speech to turn on a subjective, conclusory assessment of its relative importance is an intellectual blind alley. Existing differences in First Amendment standards governing commercial and non-commercial speech are not a reflection of the so-called relative unimportance of commercial speech. Rather, they are the logical consequences of differences between a "speaker-centered" and "hearer-centered" jurisprudence. Political and esthetic speech is intensely concerned with the self-expressive interest of the speaker. *Cohen v. California*, 403 U.S. 15 (1971). Commercial speech is intensely concerned with the instrumental interest of hearers in receiving information that enhances the capacity for informed choice. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). When commercial speech does not enhance the hearer's capacity for informed choice because it

is false or misleading or involves unlawful activity, the speech does not qualify for First Amendment protection. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); *Friedman v. Rogers*, 440 U.S. 1 (1979). When, however, hearers possess a cognizable interest in receiving commercial information because it enhances their capacity for informed choice, commercial speech may not be banned pursuant to a conclusory assertion about its relative unimportance. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85 (1977). See Point I, *infra* at 8-15.

Once Cincinnati is denied the luxury of cloaking its discriminatory treatment of commercial speech in a conclusory and inaccurate assertion of its relative unimportance, the speech ban at issue in this case may not be sustained under any level of First Amendment scrutiny. First, the scheme is invalid as an attempt to regulate speech on the basis of content. E.g., *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S.Ct. 501 (1991); *Minneapolis Star & Tribune Company v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). See Point II.A., *infra*, at 16-19. Second, the regulation is not a narrowly tailored means of directly advancing Cincinnati's asserted regulatory interests. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91 (1990). See Point II. B., *infra*, at 19-21. Third, Cincinnati's regulatory scheme rests on a facially unconstitutional ordinance imposing a total ban on the distribution of commercial handbills in any public place. The effect of such a scheme is to outlaw all commercial handbilling unless it receives the prior permission of the authorities; a classic, unconstitutional prior restraint. *Lowe v. S.E.C.*, 472 U.S. 181, 204-05 (1985). *Id.* at 211, 234-35 (White, J. concurring, joined by Chief Justice Burger and Rehnquist, J.). See Point II. C., *infra*, at 21-23. Finally, Cincinnati's regulation forces commercial speakers to purchase

space in a newspaper if they wish to distribute their commercial messages via newsracks. Accordingly, it forces commercial speakers to subsidize newspapers as the price of distributing a commercial message via a sidewalk newsrack. While commercial speakers recognize the significant advantages of conveying commercial messages in newspapers, they cannot be compelled by law to do so. E.g. *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *Wooley v. Maynard*, 430 U.S. 705 (1977). See Point II. D., *infra*, at 23-25.

ARGUMENT

Introductory Statement

Cincinnati's newsrack regulation is neither content-neutral,[1] nor narrowly tailored.[2] Rather, Cincinnati has granted one

1 In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), three members of the Court expressed the opinion that a content-neutral ban on all sidewalk newsracks would be constitutional. *Id.* at 773 (dissenting opinion of White, J., joined by Stevens and O'Connor, JJ.). The opinion for the Court declined to reach the issue. *Id.* at 762, n.7. The Chief Justice and Justice Kennedy did not participate in *City of Lakewood*.

Given the critical role of streets and sidewalks as traditional fora for expression, *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147 (1939), most lower courts have invalidated total bans on sidewalk newsracks. E.g., *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1196-97 (11th Cir. 1991); *Providence Journal Co. v. City of Newport*, 665 F. Supp. 107 (D.R.I. 1987); *Chicago Newspaper Publishers Association v. City of Wheaton*, 697 F. Supp. 1464 (N.D. Ill. 1988); *Multimedia Pub. Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport District*, 774 F.Supp. 977 (D.S.C. 1991); *Southern New Jersey Newspapers, Inc. v. State of N.J. Dep't of Transportation*, 542 F. Supp. 173 (D.N.J. 1982); *Philadelphia Newspapers, Inc. v. Borough Council*, 381 F. Supp. 228 (E.D. Pa. 1974); *Remer v. City of El Cajon*, 52 Cal. App. 3d 441, 125 Cal. Rptr. 116 (Cal. App. 4th Dist. 1975); *Passaic Daily News v. City of Clifton*, 200 N.J. Super. 468, 491 A.2d 808 (N.J.Super.L. 1985). *But see, Gannett Satellite Information Network, Inc. v. Berger*, 894 F.2d 61 (3d Cir. 1990) (dictum).

2 Courts are unanimous in upholding reasonably specific, narrowly tailored geographical, financial, numerical, size and appearance

category of constitutionally protected speech—newspapers—unlimited access to sidewalk newsracks, while absolutely banning commercial speakers from the desirable medium. *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 465 (6th Cir. 1991). See *City of New York v. Learning Annex, Inc.*, 150 Misc.2d 791, 571 N.Y.S.2d 380 (Sup. Ct. N.Y. Co. 1991) (invalidating selective ban on commercial users of newsracks).

Cincinnati attempts to defend its discriminatory regulation by arguing that speech delivered by newspapers is more important than speech delivered by commercial speakers. *Amici* do not quarrel with the welcome recognition of the high degree of constitutional protection available to newspapers. See generally Stewart, *"Or of the Press"*, 26 Hast. L.J. 631 (1975). Nor do *amici* quarrel with the proposition that Cincinnati may impose narrowly-tailored regulations on the use of sidewalk newsracks that directly advance its legitimate interests in safety, convenient public passage and esthetics. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91 (1990). But Cincinnati has not attempted a narrowly tailored regulatory response to newsracks.[3] Instead, Cincinnati seeks to grant newspapers

requirements on the use of sidewalk newsracks. E.g., *Jacobsen v. Harris*, 869 F.2d 1172 (8th Cir. 1989); *Jacobsen v. Crivaro*, 851 F.2d 1067 (8th Cir. 1988); *Gannett Satellite Information Network, Inc. v. Township of Pennsauken*, 709 F. Supp. 530 (D.N.J. 1989). Standardless licensing schemes are, however, unconstitutional. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

3 The Cincinnati regulation takes a curious form. An outdated, facially unconstitutional city ordinance dating from the era of *Valentine v. Chrestensen*, 316 U.S. 52 (1942), bans the distribution of all commercial handbills in any public place. *Cincinnati Municipal Code*, Sec. 714-23. Recognizing that the ordinance is unconstitutional in virtually all its applications, Cincinnati enforces it selectively. Since no exemption was granted to respondents, however, Cincinnati argues that the distribution of commercial material through the medium of sidewalk newsracks is prohibited by Sec. 714-23, despite its facial invalidity. Such a regulatory scheme is both an unconstitutional prior

unlimited use of newsracks with no effort to control their number, size, location or appearance, 946 F.2d at 467, n.3,[4] while flatly banning commercial speakers from access to newsracks because, in Cincinnati's view, commercial speech is insufficiently important to warrant access. Discriminatory treatment of such magnitude and irrationality aimed at a category of protected speech cannot survive First Amendment scrutiny.

Sustaining Cincinnati's casual exercise in selective censorship would eviscerate the Court's landmark holdings in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) and *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85 (1977). In *Virginia Pharmacy*, the Court held that efforts to censor commercial speech may not be premised on an assertion that advertising is too unimportant to warrant First Amendment protection. 425 U.S. at 763-765. In *Linmark Associates*, the Court held that a significant medium of commercial speech could not be suppressed even to advance an interest as important as racial integration, despite the existence of alternative means of communication. In this case, Cincinnati advances the alleged unimportance of commercial speech to justify a selective ban on commercial speech; a selective ban that fails to advance any of Cincinnati's asserted regulatory interests. If such a clear mismatch between asserted regulatory interest and a selective ban on commercial speech is upheld on the grounds that commercial speech is too unimportant to require more precise analysis, little will remain of First Amendment protection for commercial speech.

restraint and a standardless licensing system. *Lowe v. S.E.C.*, 472 U.S. 181 (1985); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Lovelll v. Griffin*, 303 U.S. 444 (1938). See Point II. C. *infra* at 21.

4 The District Court found that respondents' commercial newsracks accounted for only 62 of the 1,500-2,000 newsracks on the Cincinnati streets. 946 F.2d at 467.

I.

FIRST AMENDMENT STANDARDS GOVERNING COMMERCIAL AND NON-COMMERCIAL SPEECH REFLECT THE DIFFERING SPEECH INTERESTS PRESENT IN EACH CONTEXT, AND NOT A DETERMINATION THAT SPEECH ABOUT COMMERCE IS LESS "IMPORTANT" THAN SPEECH ABOUT ART, SCIENCE, RELIGION OR POLITICS.

The District Court accepted Cincinnati's characterization of the speech at issue in this case as "commercial". See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973). Accordingly, analysis of the free speech issues posed by Cincinnati's ban has unfolded under the rubric of the commercial speech doctrine. While *amici* believe that Cincinnati's ban cannot survive scrutiny under the commercial speech doctrine, this case illustrates the danger of substituting labels for analysis in the area of free speech. The speech at issue in this case—information concerning educational and residential opportunity—directly implicates two of our most cherished constitutional values: educational freedom and residential mobility. Whatever label is ultimately placed on such speech, it is entitled to plenary constitutional protection because it is so closely bound up with the enjoyment of core constitutional values. As this Court has explicitly held, merely because information is delivered with the motive of earning a profit, it does not lose its First Amendment status. E.g., *Bigelow v. Virginia*, 421 U.S. 1 (1975); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The speech at issue in *New York Times v. Sullivan* was, after all, a paid advertisement soliciting funds. The speech at issue in *Bigelow* was a classic paid advertisement for the services of a health clinic. Indeed, one court has already held that speech virtually identical to the educational information at issue herein cannot be characterized as commercial for First Amendment purposes. *City of New York v. Learning Annex, Inc.*, 150 Misc. 2d 791, 571 N.Y.S. 2d 380 (Sup. Ct. N.Y. Co. 1991). Accordingly, *amici* urge the Court

to apply traditional free speech principles to Cincinnati's regulation.

Even if, however, the Court accepts the characterization of the speech at issue in this case as commercial,[5] Cincinnati's scheme cannot withstand constitutional scrutiny. First Amendment standards governing commercial and non-commercial speech are not identical. For example, commercial speech proposing an unlawful transaction is entitled to no constitutional protection, while the same genre of speech in a non-commercial setting receives substantial protection under the "clear and present danger" test. Compare, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) with *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Similarly, while false or misleading commercial speech is not entitled to First Amendment protection under the Court's precedents, it is an article of faith in the non-commercial speech area that there is no such thing as an officially false idea. Compare *Friedman v. Rogers*, 440 U.S. 1 (1979) with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See *National Socialist Party v. Skokie*, 432 U.S. 43 (1977); *Collin v. Smith*, 447 F.Supp. 676 (N.D. Ill.), aff'd, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).[6]

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5 The Court has noted the difficulty of distinguishing between commercial and non-commercial speech. E.g. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 579 (1980) (Stevens, J., concurring); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983); *Id.* at 81 (Stevens, J. concurring); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 481-82 (1989). This case illustrates the dilemma, since newspapers may carry the identical message as a commercial handbill, but are treated as non-commercial speech. The point at which a collection of commercial handbills with minimal commentary turns into a newspaper is impossible to define.

As did the Courts below, *amici* assume for the purposes of this argument the capacity to draw a principled line between commercial and non-commercial speech. In fact, the two categories blend inexorably.

6 See generally *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976). Compare, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) with *In re Primus*, 436 U.S. 412 (1978). Cf. *Young v. American Mini Theaters*, 427 U.S. 50 (1976) (plurality opinion).

Seeking to explain the differential in First Amendment standards by ascribing a lower value to commercial speech is, however, triply unfortunate.

First, differential standards of free speech protection should not turn on subjective, necessarily content-based value judgments about the relative social worth of categories of expression. *Young v. American Mini Theaters*, 427 U.S. 50, 82, n.6 (1976) (Powell, J. concurring); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 761 (1978) (Powell, J. concurring). Implicit in a determination that commercial speech is less important than non-commercial speech is a complex set of value judgments that the First Amendment leaves to individuals, not to the State. Characterizing speech about religion, esthetics or politics as important, while denigrating the importance of speech about commerce, masks an impermissible cultural judgment. In effect, it says that speech about ideas, the "business" of intellectuals, is free from governmental restriction; but that speech about everyone else's "business" is fair game for casual regulation by the State. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 Am. Econ. Rev. 384 (1974); Director, *The Parity of the Economic Marketplace*, 7 J.L. & Econ. 1 (1964); Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945).

Second, as this case illustrates, denigrating the importance of commercial speech encourages officials to avoid the difficult task of deciding whether a restriction on commercial speech is "narrowly tailored" to "directly advance" the State's asserted interests. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91 (1990). As the Sixth Circuit demonstrated below, Cincinnati's legitimate concern with esthetics and safety cannot justify a selective, total ban on commercial newsracks, since the commercial or non-commercial nature of material in a newsrack has no effect on the receptacle's appearance or safety. 946 F.2d at 467. See *Boos v. Barry*, 485 U.S. 312 (1988).

Finally, the assertion by Cincinnati that commercial speech is less important than non-commercial speech is wrong, both at the level of society and the individual. The First Amendment protects political democracy and free markets by assuring the uncensored flow of information on which each depends. Political democracy requires robust free speech protection in order to assure that voters receive information needed to make an informed choice. See Meiklejohn, *Free Speech and Its Relationship to Self-Government* (1948). Free markets also depend upon informed choice. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764-65 (1976) (recognizing the relationship between commercial speech and efficient markets). See Coase, *Advertising and Free Speech*, 6 J. Legal Stud. 1 (1977). Consumers vote with their dollars, just as citizens vote with their ballots. If government can casually control the flow of information to voters, the free political choice at the core of a functioning democracy is imperilled. See Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191. Similarly, if government can casually control the flow of commercial information to consumers, the free market choice at the core of our economic system is imperilled. See Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429 (1971).

Moreover, from the standpoint of an individual hearer, it is often demonstrably more important to receive information about a product critical to health or happiness than to receive non-commercial information. Compare, e.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763-64 (1976) (price advertising of prescription drugs) and *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 86 (1977) (real estate information) with *Cohen v. California*, 403 U.S. 15 (1971) (scatological phrase on speaker's jacket); and *Texas v. Johnson*, 491 U.S. 397 (1989) (burning the American flag). Cincinnati's dismissive approach radically undervalues the informational significance of commercial

speech. The Sears, Roebuck Catalogue was as influential in shaping our national ethic as the McGuffey Reader. Contemporary commercial speech provides Americans with a flow of information concerning educational opportunities, health care options, recreational choices, investment opportunities and employment options, to mention only a few categories. Is Cincinnati prepared to dispute the relative "importance" of the price information about prescription drugs in *Virginia Pharmacy* and the march by the Nazi party protected in *Skokie*? The relative value of information about health insurance and burning the American flag protected in *Texas v. Johnson*? Or the relative importance of information about educational opportunities at issue in this case and the invitation to "Fuck the Draft" held protected in *Cohen v. California*?

In fact, the differential First Amendment protection that concededly exists between commercial and non-commercial speech is not attributable to official judgments about the relative importance of the two categories of protected speech.[7] Rather, it reflects significant differences between the interests of speakers and hearers in the two contexts.

In most non-commercial settings, would-be censors confront two distinct sets of interests militating strongly in favor of free speech: the dignitary interest of the speaker in self-expression; and the instrumental interest of the hearer in receiving information. Compare, T. Emerson, *The System of*

7 In *Virginia Pharmacy*, 425 U.S. at 762-63 and n.24, this Court outlined several "commonsense differences" between commercial and non-commercial speech. "The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting and political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sin qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely." *Id.* at n.24. This Court, however, despite numerous opportunities to consider relevant distinctions, has never cited relative importance as a basis for differentiation between commercial and non-commercial speech.

Free Expression (1970) with A. Meiklejohn, *Political Freedom* (1960). Not surprisingly, when the two sets of interests coincide, free speech protection is at its apogee. E.g., *Stromberg v. California*, 283 U.S. 359 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971). When they are in tension, the Court has recognized that the speaker's interest in self-expression supports a broad toleration principle that protects self-affirming speech, even when it is offensive to hearers. E.g. *Cohen v. California*, 403 U.S. 15 (1971); *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990). While concerns of hearers are accorded significant weight in certain non-commercial settings, e.g., *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (right to receive information from abroad); *Frisby v. Schultz*, 487 U.S. 474 (1988) (right to be free from "focused picketing" at home); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (right not to be "captive audience"), it is fair to characterize, indeed, to celebrate, the First Amendment jurisprudence of this Court in areas of religion, politics, art and science as "speaker-centered". E.g., *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *Hustler Magazine v. Falwell*, 485 U. S. 46 (1988). See generally Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (1986).

Commercial speech that "merely proposes a commercial transaction"[8] may not involve dignitary self-expression. A toleration-based concern with the *speaker's* interest in self-expression is, therefore, less intense in the commercial speech area. But the *hearer's* interest in receiving commercial speech is, if anything, more intense than in many non-commercial settings. See Neuborne, *The Pomerantz Lecture: First Amendment and Government Regulation of Capital Markets*, 55 Brooklyn L. Rev. 5, 31-32 (1989). The differ-

8 The phrase is drawn from *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

ences in First Amendment protection accorded to commercial and non-commercial speech are, therefore, the logical consequences of differences between a "speaker-centered" and a "hearer-centered" jurisprudence, and not, as Cincinnati argues, a consequence of the diminished importance of commercial speech. Thus, commercial speech about unlawful activities and false or misleading commercial speech is not constitutionally protected because hearers have no interest in receiving it.

Once a cognizable hearer interest is present, as it unquestionably is in this case, the Court has repeatedly ruled that commercial speech is entitled to significant First Amendment protection. In the years since *Virginia Pharmacy*, the Court has repeatedly applied a "hearer-centered" analysis in granting First Amendment protection to a free flow of commercial speech. E.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763-65 (1976) (right to receive commercial messages); *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85, 96-97 (1977) (right to receive real estate information); *Carey v. Population Services, Int'l.*, 431 U.S. 678, 701 (1977) (right to receive birth control information); *Bates v. State Bar of Arizona*, 433 U.S. 350, 374-75 (1977) (right to receive price information on legal services); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 567-68 (1980) (right to receive information on electrical services); *In re R.M.J.*, 455 U.S. 191 (1982) (right to receive information on legal services); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (right to receive birth control information); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643, 646-47 (1985) (right to receive information on legal services); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (same); *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91, 109-111 and n.18 (1990) (same). Indeed, only when a cognizable hearer interest has been absent has the Court upheld censorship of commercial speech. E.g., *Friedman v. Rogers*, 440 U.S. 1 (1979) (risk of misleading hearers justifies restriction on use of trade names by optometrists); *Pittsburgh Press Co.*

v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (lack of cognizable hearer interest justifies banning speech proposing unlawful commercial transaction); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989) (safety interest of student-hearers justifies stringent regulation of outsiders in college dormitories; remanded to determine whether regulation unconstitutionally overbroad).[9]

Cincinnati's failure to appreciate the hearer-centered nature of commercial speech led it to a regulatory decision based solely on an assessment of the commercial speaker's interest; an assessment reminiscent of *Valentine v. Chrestensen*, 316 U.S. 52 (1942), that completely overlooked the interest of hearers in the free flow of commercial information. The Sixth Circuit properly vacated such a myopic regulatory judgment, leaving Cincinnati free to enact "narrowly tailored" rules governing sidewalk newsracks that are sensitive to a hearer's right to receive commercial information relevant to the making of informed market choices.

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9 In *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), the Court upheld a regulation banning casino advertising "aimed" at natives of Puerto Rico. The regulation, as modified by the Supreme Court of Puerto Rico, permitted casino advertising in the Spanish language press and the distribution of promotional material in Spanish, despite the fact that natives would read it. As modified by the Supreme Court of Puerto Rico, therefore, casino advertising was widely available throughout the Commonwealth, as long as it was not "aimed" at natives. Thus, *Posadas* is an example of the regulation of advertising that allegedly improperly targets an audience deemed particularly vulnerable by the legislature. No issue of improper targeting is present in this case.

II.

CINCINNATI'S ATTEMPT TO GRANT NEWSPAPERS AN UNRESTRICTED MONOPOLY ON THE USE OF NEWSRACKS, WHILE BARRING COMMERCIAL SPEAKERS FROM ACCESS TO THE MEDIUM, VIOLATES THE FIRST AMENDMENT

Once Cincinnati is denied the luxury of cloaking its content-based censorship in a conclusory and inaccurate assessment of the relative "unimportance" of commercial speech and is required to test its regulatory judgment against the First Amendment, the discriminatory regulation cannot be sustained.

A. Cincinnati's Regulation Is Content-Based, Since It Discriminates Between Categories of Speech Without Any Functional Justification

The core of the First Amendment is its ban on content-based discrimination. Since political and economic decisions in a free society should reflect the informed preferences of individuals, any attempt by government to limit the free flow of information endangers our system. But when government seeks to distort the raw material of choice by artificially removing a disfavored point of view from the information marketplace, the threat to our system is particularly acute. *Boos v. Barry*, 485 U.S. 312 (1988); *Schacht v. United Sates*, 398 U.S. 58 (1970). See generally Stone, *Content Discrimination and the First Amendment*, 25 Wm. & Mary L.Rev. 189 (1983). Accordingly, the Court has consistently invalidated speech regulations that permit government to discriminate on the basis of content. E.g., *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S.Ct. 501 (1991) (victim compensation provisions applying solely to proceeds of convict speech unconstitutional as content-based); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (tax rates keyed to magazine content unconstitutional as content-based); *Minneapolis Star & Tribune Company v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (newspaper tax rates keyed to circulation unconstitutional as content-based); *Police Dep't. of City of Chicago v. Mosley*, 408 U.S. 92 (1972) (picketing rules distinguishing between labor picketing and other subject matter unconstitutional as content-based); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (newspaper tax rates keyed to circulation unconstitutional).

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S.Ct. 501 (1991), for example, this Court invalidated an attempt by New York State to impound the proceeds of a convict's crime-related writings in order to make them available to his victim for restitution. The Court readily acknowledged that victim restitution was a highly worthwhile government interest, but, nevertheless, invalidated the regulations because they treated the proceeds of speech more harshly than other forms of property. Moreover, it matters not whether the government actually intends to manipulate the marketplace of ideas. *Simon & Schuster*, 112 S.Ct. at 509. Regulations permitting content-based censorship are presumptively unconstitutional even if they are enacted in good faith. *Minneapolis Star & Tribune Company v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). In *Minneapolis Star*, the State imposed a differential tax rate on newspapers based on circulation. The Court explicitly noted that no evidence existed of an attempt to manipulate the marketplace of ideas. Nevertheless, the Court invalidated the differential tax because it empowered the government to discriminate among newspapers on the basis of content. See also *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).[10]

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10 Where no possibility of discrimination on the basis of content is present, government may treat speakers differently. Thus, in *Leathers v. Medlock*, 111 S.Ct. 1438 (1991), the Court upheld a tax levied on a segment of the media because no potential for discrimination on the basis of content was present, since the material carried by both taxed and untaxed categories of speaker was quite similar.

Cincinnati's attempt to ban commercial speakers from sidewalk newsracks, while granting newspapers unrestricted access to them, overtly draws a regulatory line on the basis of content. *Police Dep't. of City of Chicago v. Mosley*, 408 U.S. 92 (1972). The discriminatory regulation artificially distorts the mix of information and ideas that is the raw material of free choice. Accordingly, it is vulnerable to constitutional attack unless the discriminatory regulation is necessary to advance an interest of extraordinary importance. While *amici* agree that safety and esthetics are legitimate government interests that would justify narrowly tailored, content-neutral regulation of newsracks, neither safety nor esthetics supports a content-based distinction between commercial speech and newspapers. As in *Simon & Schuster*, the content-based line drawn by Cincinnati is simply not germane to the advancement of the relevant State interests. *Simon & Schuster*, 112 S.Ct. at 510-511. See also *Boos v. Barry*, 485 U.S. 312 (1988).

Amici do not contend that the ban on content-based censorship requires identical treatment of commercial and non-commercial speech. Where functional justifications for disparate treatment exist, as in the areas of false or misleading speech or speech about unlawful action, *amici* agree that different First Amendment standards govern the two categories of speech. See *supra* Point I at 12-15. But where, as here, no functional basis exists to treat them differently, the ban on content-based censorship applies to prevent well-meaning censors from allowing their subjective values to distort the free flow of information critical to both political and economic choice.[11]

11 The Court has determined that the "secondary effects" associated with businesses disseminating sexually explicit speech functionally justify a content-based distinction in their regulation. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). See also *United States v. Kokinda*, 110 S.Ct. 3115 (1990) ("secondary effects" caused by solicitation justify disparate treatment of solicitation and distribution). Where, however, the regulated category of speech does not create a "secondary effect" justifying disparate regulation, the Court has applied the ban on content-based censorship to invalidate attempts to distinguish between categories of speech based on content. *Boos v. Barry*, 485 U.S. 312 (1988). Cincinnati has made no attempt to argue that newsracks containing commercial material exert "secondary effects" that differ from newspaper newsracks.

Finally, the effect of Cincinnati's ban is to erect a distinction between established and less established commercial speakers. Established commercial speakers will find it relatively easy to buy access to sidewalk newsracks by purchasing space in newspapers. Less established speakers will be unable to utilize the medium, since they cannot afford to purchase advertising space in a newspaper. In effect, therefore, the distinction created by the scheme is precisely the content-based distinction between established and struggling speakers that this Court condemned in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) and *Minneapolis Star & Tribune Company v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).[12]

B. Cincinnati's Regulation Violates the Rights of Consumers to Receive Information Relevant to Market Choices

Even if one ignores the content-based nature of Cincinnati's regulation, it operates to limit the flow of information to consumers relevant to the making of informed economic choices. Accordingly, it violates their First Amendment rights unless it is a "narrowly tailored" attempt to "directly advance" a legitimate State interest. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

12 Cincinnati's insistence upon labelling the publications at issue in this case as commercial speech raises the prospect of content-based censorship of a wide variety of non-commercial speech merely by labelling it as commercial. For example, many local newspapers containing significant amounts of advertising are virtually indistinguishable from the materials in this case. The power to impose content-based censorship on newspapers is enhanced by Cincinnati's insistence that newspapers be "of *general* circulation [emphasis added]" in order to warrant access to newsracks. See Amended Regulation 38. Whether a local newspaper is "of general circulation" is left to bureaucratic discretion.

Peel v. Attorney Registration and Disc. Comm'n, 496 U.S. 91 (1990). While narrowly tailored regulations limiting the size, placement, number and appearance of sidewalk newsracks would advance Cincinnati's legitimate interest in safety, esthetics and convenient public passage, a total ban on commercial newsracks cannot be called "narrowly tailored", since it is far broader than reasonably necessary to advance the State's legitimate interests. E.g., *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1196-97 (11th Cir. 1991); *Providence Journal Co. v. City of Newport*, 665 F. Supp. 107 (D.R.I. 1987); *Chicago Newspaper Publishers Association v. City of Wheaton*, 697 F. Supp. 1464 (N.D. Ill. 1988); *Multimedia Pub. Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport District*, 774 F. Supp. 977 (D.S.C. 1991); *Southern New Jersey Newspapers, Inc. v. State of N.J. Dep't of Transportation*, 542 F. Supp. 173 (D.N.J. 1982); *Philadelphia Newspapers, Inc. v. Borough Council*, 381 F. Supp. 228 (E.D. Pa. 1974); *Remer v. City of El Cajon*, 52 Cal. App. 3d 441, 125 Cal. Rptr. 116 (Cal. App. 4th Dist. 1975); *Passaic Daily News v. City of Clifton*, 200 N.J. Super. 468, 491 A.2d 808 (N.J.Super.L. 1985). Moreover, the distinction between commercial speech and newspapers palpably fails to "directly advance" the State's asserted interests.

In *Linmark Associates*, the Township of Willingboro sought to ban only one method of informing potential buyers of the availability of houses for sale—"For Sale" signs displayed on the seller's property. Willingboro argued, much as Cincinnati argues in this case, that adequate alternative means of communication existed, such as handbills and newspaper advertising; and that the restriction was necessary to prevent the erosion of integrated neighborhoods through panic selling and racial "blockbusting". Despite the availability of alternative means of communication and the undoubtedly legitimate state interest in maintaining racial integration, the Court invalidated the restriction on the free flow of commercial information. *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85 (1977). Cincinnati's selective attempt to

close newsracks solely to commercial speakers is even less defensible than was Willingboro's attempt to ban public "For Sale" signs. As in *Linmark*, the asserted alternative means of communication are far less effective and much more expensive. Even more importantly, as in *Linmark*, the ban is considerably broader than reasonably necessary to advance the State's interest, which, in any event, is not "directly advanced" by the bright-line distinction between newspapers and commercial leaflets. In *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91 (1990), this Court reiterated the obligation of a commercial censor to use narrowly tailored means to advance the State's interest. Wholesale limitations on potentially helpful commercial information cannot be imposed when more narrowly tailored regulations would clearly be sufficient. Since more narrowly tailored regulations relating to size, placement and appearance could clearly satisfy Cincinnati's articulated interests, a blanket ban on all commercial newsracks is unreasonably broad.

C. Cincinnati's Regulation is a Facially Unconstitutional Prior Restraint Since It Purports to Ban All Commercial Speech Activity That Does Not Receive a Discretionary Exemption From a Total Ban on Commercial Handbilling

Cincinnati retains on its books an ordinance, dating from the era of *Valentine v. Chrestensen*, absolutely forbidding the distribution of commercial handbills in any public place.[13] *Cincinnati Municipal Code*, Sec. 714-23. When *Virginia Pharmacy* overruled *Valentine v. Chrestensen* and held that commercial speech enjoys significant First Amendment protection, the Cincinnati ordinance was rendered unconstitutional in virtually all its potential applications. Despite the ordinance's blatant unconstitutionality, Cincinnati continues

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13 Cincinnati defines commercial handbills as:

> any printed or written matter . . . which advertises for sale any merchandise . . . or which directs attention to any business or mercantile or commercial establishment . . . for the purpose of either directly or indirectly promoting the interest thereof by sales. . . . *Cincinnati Municipal Code*, Sec. 701-1-C.

to give it legal force, although it enforces the ordinance selectively to ban only certain types of commercial speech. The Department of Public Works initially declined to enforce the ordinance against respondents, granting them a permit to use sidewalk newsracks under Amended Regulation 38.[14] 946 F.2d at 466. In February 1990, however, the Cincinnati City Council directed the Department of Public Works to enforce the underlying ban on distributing commercial handbills against respondents. Thus, Cincinnati's regulatory scheme consists of a facially unconstitutional ordinance imposing a total ban on the distribution of commercial handbills, tempered by a standardless power to grant exceptions to the complete ban. The effect of such a scheme is to outlaw all commercial handbilling unless it receives the prior permission of the authorities; a classic, unconstitutional prior restraint. *Lowe v. S.E.C.*, 472 U.S. 181, 204-05 (1985). *Id.* at 211, 234-35 (White, J. concurring, joined by Chief Justice Burger and Rehnquist, J.).

Moreover, since such a regulatory scheme rests on a facially unconstitutional regulation and vests totally unbridled discretion in city authorities to decide when to invoke it, the scheme is clearly unconstitutional. As in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), Cincinnati may not use a facially unconstitutional statute as a device to regulate commercial speech. While *amici* are mindful that the First Amendment overbreadth doctrine is not fully applicable to commercial speech, *Bates v. State Bar of Arizona*, 433 U.S. 350, 379-381 (1977), attempting to regulate protected speech by granting *ad hoc* exemptions from a statute that is unconstitutional in virtually every application is the equivalent of ruling by lawless fiat.[15] This Court has invalidated standard-

14 Amended Regulation 38 is, itself, a standardless permit system, invalid under *City of Lakewood*.

15 Over a hundred years ago, in *United States v. Reese*, 92 U.S. (2 Otto) 214 (1875), the Court noted the danger of governing by blunderbuss statute.

(footnote continued)

less licensing schemes governing access to sidewalk newsracks. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). See *Lovell v. Griffin*, 303 U.S. 444 (1938); *Hynes v. Borough of Oradell*, 425 U.S. 610 (1976). Although Cincinnati's route is somewhat more tortuous, the result is a standardless licensing system even more offensive to First Amendment principles than the scheme invalidated in *City of Lakewood*, since the range of discretion is absolute.

D. Cincinnati's Regulation Violates the Rights of Commercial Speakers By Forcing Them to Subsidize Non-Commercial Speech as the Price of Access to Sidewalk Newsracks

Commercial messages may be delivered in at least two ways. A commercial speaker can attempt to communicate directly with potential customers through handbills, hawkers and signs. Sidewalk newsracks provide an inexpensive method of engaging in such direct communication. Alternatively, a commercial speaker may communicate indirectly, by purchasing space in a non-commercial medium like a newspaper in order to disseminate the identical message. Cincinnati's regulations force commercial speakers to purchase space in a newspaper if they wish to distribute their commercial messages via newsracks. While most commercial speakers recognize the significant advantages of conveying commercial messages in general publications, they cannot be compelled by law to do so. The Court has never tolerated laws forcing individuals to subsidize the speech of third-persons as the price of speaking themselves. E.g., *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (right of reply statute unconstitutional); *Wooley v. Maynard*, 430 U.S. 705 (1977) (coerced speech on license plates invalid); *Elrod v. Burns*, 427 U.S. 347 (1976) (linking public employment to political affili-

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. 92 U.S. at 221.

ation unconstitutional); *Branti v. Finkel*, 445 U.S. 507 (1980) (same); *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990) (same); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (limits on involuntary use of union shop agency fees); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (limits on involuntary use of bar dues). Where a commercial speaker wishes to communicate directly with the public, either because it is too expensive to purchase space in a newspaper or magazine[16], or because the direct communication appears more effective, or because the commercial speaker does not wish to subsidize the non-commercial publication[17], the speaker cannot be penalized by being excluded from a significant medium of communication. *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986).

In *Pacific Gas & Electric*, the Court ruled that public utilities could not be forced to include the speech of third-persons in their billing envelopes as the price of communicating directly with the public. In this case, commercial speakers must pay a literal price to communicate with the public through sidewalk newsracks by subsidizing the publication with monopoly access to the newsracks. Since Cincinnati has not even attempted to posit a State interest in forcing commercial speakers to subsidize newspapers as the price of using newsracks, the grant of monopoly access to newspapers cannot be sustained.

Moreover, since *Tornillo* protects the press from being forced to carry involuntary messages, there is no guaranty that a newspaper will accept a commercial speaker's submis-

16 Since sidewalk newsracks are less expensive than individual handbillers, they provide an important "circulation" medium for less established commercial speakers. *Ex parte Jackson*, 96 U.S. (6 Otto) 727, 733 (1877). Established ventures are better able to afford the far more expensive technique of purchasing space in non-commercial publications.

17 In a community with only one local newspaper, the effect is to force commercial speakers to subsidize an editorial policy with which they may strongly disagree as the price of gaining access to sidewalk newsracks.

sion. In effect, therefore, Cincinnati's scheme gives newspapers a veto over a commercial speaker's access to a sidewalk newsrack. If, for example, a Cincinnati museum wished to advertise the opening of a controversial exhibit of photographs, the advertising standards of local newspapers would determine the museum's access to a sidewalk newsrack. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1976).

CONCLUSION

For the above-cited reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

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